In the principal case, the directors of a corporation distributed its capital, and in doing so violated section 309 of the Civil Code, but apparently the persons who received the proceeds were the same as those who would have received them if the corporation had been wound up in the authorized way. Subsequently the franchise was forfeited for failure to pay taxes. Later still, the person who held the stock certificates desired to carry on another business in a corporate form and after reviving the corporation used it for the purpose. The court, in deciding that the old directors were not liable to the new stockholders, "disregarded the entity," holding that the body doing the later business was not the same as the old. The opinion is interesting and graphic and commends itself to one's sense of justice, but would it not have been better to discard all figures of speech about life and death in corporations, and to have said boldly: after a corporation ceases to do one business and its assets are fairly and fully distributed, the code section does not apply in favor of later stockholders taking stock in return for different assets to be used in a different business?[5] *A. T. W. and C. O. H.*

CONTRACTS IN RESTRAINT OF TRADE: AGREEMENT BY RETIRING STOCKHOLDER—"Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind otherwise than is provided by the next two sections is to that extent void."[1] The only exceptions are that a vendor of the good will of a business may agree not to carry on a similar business within a single specified county, city or part thereof so long as the vendee, or his successors, carry on a like business therein,[2] and that a partner in anticipation of the dissolution of the partnership may agree not to carry on a similar business within the same city, town or part thereof where the partnership's business

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(1918) 27 Cal. App. Dec. 259 (1919) 57 Cal. Dec. 451, 181 Pac. 780. A survey of these cases will show that it appeared in the pleadings and proof that the conveyance by the old to the new corporation was in fraud of creditors. It would seem that there is no necessity to "disregard the corporate entity" in such a situation. This is borne out by Knech v. Speedwell Motor Car Co. (1914) 24 Cal. App. 123, 140 Pac. 598, 140 Pac. 600. In that case, relief was denied where it did not appear in either the pleadings or the proof that the conveyance was fraudulent, in having been made to hinder, delay and defraud the creditors of the old corporation. See also Atkinson v. Western Development Syndicate (1915) 170 Cal. 503, 150 Pac. 360. In Higgins v. California Petroleum Co. (1898) 122 Cal. 373, 55 Pac. 155 (1905) 147 Cal. 363, 81 Pac. 1070, the court held that although there was no allegation of fraud in the pleadings, the organization of a new and identical corporation to avoid the obligation of a lease was constructively fraudulent at law.

[5] See Kohl v. Lilienthal (1889) 81 Cal. 378, 20 Pac. 401, 22 Pac. 689. For "disregarding the entity" in California see "Limitations of the Theory of Corporate Entity in California," 4 California Law Review, 465.

[1] Cal. Civ. Code, § 1673.
[2] Idem, § 1674.

has been transacted.[3] Saving these two clauses, all agreements or contracts which restrain the exercise of a lawful business, trade or vocation are void.[4]

In *Cavasso v. Downey*,[5] a shareholder sold all his shares of stock in a corporation to another shareholder with whom he had previously been in partnership, and covenanted not to engage in a similar business within a certain city for a period of five years. The court, failing to find in the evidence support for the trial court's finding that a partnership existed between the plaintiff and the defendant at the time of making the agreement, held that since the sale was not in anticipation of the dissolution of a partnership, the agreement not again to engage in business was void, upon the authority of earlier decisions.[6]

The California courts have uniformly held that such an agreement by a partner in anticipation of dissolution is valid.[7] In holding such an agreement by a retiring partner valid, but one by a retiring shareholder void, it would appear that the rule and code section are arbitrary, do not take into consideration modern business conditions, and are a reflection of the strictness of ancient rules, when all contracts in restraint of trade were held void, as against public policy.[8]

In the development of modern business the partnership has been supplanted in a large measure by the corporation. Decisions which hold that agreements in restraint of trade entered into by a partner in anticipation of the dissolution of the partnership are valid are based upon the need of giving "reasonable protection to him in whose favor such a contract is executed."[9] The purchaser of the stock of a corporation is equally interested in the success thereof, and should be entitled to the same protection. In the absence of a statutory provision to the contrary, a vendor of corporate stock may make a valid agreement not to engage in a competitive business against the corporation.[10]

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[3] Idem, § 1675.

[4] Getz Bros. & Co. v. Federal Salt Co. (1905) 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114.

[5] (Feb. 5, 1920) 31 Cal. App. Dec. 381, 188 Pac. 594.

[6] Merchants' Ad-Sign Co. v. Sterling (1899) 124 Cal. 429, 57 Pac. 468, 71 Am. St. Rep. 94, 46 L. R. A. 142; Dodge Stationery Co. v. Dodge (1904) 145 Cal. 380, 78 Pac. 879; Chamberlain v. Augustine (1916) 172 Cal. 285, 156 Pac. 479; Cavasso v. Downey (1919) 28 Cal. App. Dec. 770, 180 Pac. 950.

[7] Meyers v. Merillion (1897) 118 Cal. 352, 50 Pac. 662; Du Bois v. Padgham (1912) 18 Cal. App. 298, 123 Pac. 207.

[8] Ipswich Tailors' Case (1613) 11 Coke 53a, 77 Eng. Rep. R. 1218; Dutton v. Poole (1677) 2 Lev. 210, 83 Eng. Rep. R. 523; Vulcan Powder Co. v. Hercules Powder Co. (1892) 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242.

[9] Meyers v. Merillion, supra, n. 7.

[10] Up River Ice Co. v. Deuler (1897) 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Kronschnabel-Smith Co. v. Kronschnabel (1902) 87 Minn. 230, 91 N. W. 892; Fleckenstein Bros. Co. v. Fleckenstein (1908) 76 N. J. L. 613, 71 Atl. 265.

The tendency of recent decisions is to reject fixed rules and to test the validity of the contract by the reasonableness of the restraint.[11] This test clearly seems adaptable to modern business corporations, or else how can a stockholder sell his stock, receive the fruits of his labor, and at the same time give protection to the vendee?

Similarly the arbitrariness of section 1674 of the Civil Code in placing a territorial limitation of "county, city or part thereof" may well be criticised. The early doctrine that all contracts in restraint of trade were void, was gradually relaxed to suit new conditions until such contracts reasonably limited as to space were held valid,[12] the courts still insisting that contracts in restraint of trade, unlimited as to space or time and space, were void.[13]

The test of the reasonableness of the restraint both as to time and space has also in most jurisdictions been substituted for the fixed and artificial rules of the common law.[14] This doctrine is based upon the public policy of giving the vendor the right to sell upon terms most advantageous to him and not inconsistent with the interest of the public[15] and of giving adequate protection to the vendee.[16] Each case in which the question of reasonableness of restraint arises must be determined on its own particular facts, the test being "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."[17] In accordance with this test, the following agreements

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[11] Gibbs v. Consolidated Gas Co. of Baltimore (1888) 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. Rep. 553; Camors-McConnell Co. v. McConnell (1905) 140 Fed. 412; Tarr v. Stearman (1914) 264 Ill. 110, 105 N. E. 957; Marshall Engine Co. v. New Marshall Engine Co. (1909) 203 Mass. 410, 89 N. E. 548; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. (1905) 180 N. Y. 280, 73 N. E. 48; Rowe v. Toon (1918) 169 N. W. 38 (Ia.); Henschke v. Moore (1917) 257 Pa. 196, 101 Atl. 308.

[12] Catt v. Tourle (1869) L. R. 4 Ch. 654; Hitchcock v. Coker (1837) 6 Ad. & E. 438, 112 Eng. Rep. 167; Mallam v. May (1843) 11 M. & W. 653, 152 Eng. Rep. R. 967; Mitchel v. Reynolds (1711) 1 P. Wms. 181, 24 Eng. Rep. R. 347; Smith v. Leady (1893) 47 Ill. App. 441; Pierce v. Woodward (1828) 6 Pick. (Mass.) 206.

[13] Callahan v. Donnolly (1872) 45 Cal. 152, 13 Am. Rep. 172; Albright v. Teas (1883) 37 N. J. Eq. 171; Thomas v. Miles (1854) 3 Ohio St. 275; Wright v. Ryder (1868) 36 Cal. 342, 95 Am. Dec. 186; More v. Bennet (1870) 40 Cal. 251, 6 Am. Rep. 621; Alger v. Thacher (1837) 19 Pick. (Mass.) 51, 31 Am. Dec. 119; Chappel v. Brockway (1839) 21 Wend. (N. Y.) 157.

[14] Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt [1891] 1 Ch. 630; Diamond Match Co. v. Roeber (1887) 106 N. Y. 473, 13 N. E. 419; Oregon Steam Navigation Co. v. Winsor (1873) 87 U. S. 64, 22 L. Ed. 315; Whitney v. Slayton (1855) 40 Me. 224; Beal v. Chase (1875) 31 Mich. 490; Barrows v. McMurty Mfg. Co. (1913) 54 Colo. 432, 131 Pac. 430; Boggs v. Friend (1916) 77 W. Va. 531, 87 S. E. 873; Fleckenstein Bros. Co. v. Fleckenstein, supra, n. 10.

[15] Walker v. Lawrence (1910) 177 Fed. 363, 101 C. C. A. 417.

[16] Diamond Match Co. v. Roeber, supra, n. 14.

[17] Horner v. Graves (1831) 7 Bing. 735, 131 Eng. Rep. R. 284.

have been held valid: An agreement not to engage in the manufacture or sale of liquors in Indiana for five years;[18] an agreement not to manufacture guns, etc., for twenty-five years, unlimited as to space;[19] an agreement not to manufacture or sell friction matches for ninety-nine years in the United States except Nevada and Montana;[20] an agreement not to manufacture or sell grain cleansers or separators anywhere in the United States, unlimited as to time.[21]

When the restraint is general but co-extensive only with the interest to be protected and with the benefit meant to be conferred, there seems today to be no good reason why, as between the parties themselves, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. However, the public has a vital interest in contracts in restraint of trade which tend towards a monopoly, and where a contract in restraint of trade is injurious to the public interest, it will not be sustained, although it is reasonable as between the parties themselves.[22]

If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or business and prevent his becoming a competitor with the covenantee. With the growth of commerce and the annihilation of of distance, the boundaries of a "county, city or part thereof"[23] are not those of trade and commerce. Yet under the code section an agreement in restraint of trade exceeding the territorial limits of a county must be held void, even though unreasonable. The reason for the rule has departed, yet the rule is tenaciously clung to.

To quote the learned justice in Maxim Nordenfelt Gun and Ammunition Company v. Nordenfelt: "To adhere in all cases to the old rule that a covenant in restraint of trade must be void, if it extends to the whole of England, will frequently be found to sacrifice the principle which underlies the rule to the rule itself—and whenever this is the case, to adhere to the rule is as contrary to sound legal principles as it is contrary to good sense."[24]

G. H. H.

EVIDENCE: BOOKS OF ACCOUNT: LAYING FOUNDATION—To enable books of account to be received in evidence, a proper

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[18] Kochenrath v. Christman (1918) 180 Ky. 799, 203 S. W. 738.
[19] Maxim Nordenfelt Guns v. Nordenfelt, supra, n. 14.
[20] Diamond Match Co. v. Roeber, supra, n. 14.
[21] Prame v. Ferrell (1909) 166 Fed. 702, 92 C. C. A. 374.
[22] Fowle v. Park (1889) 131 U. S. 88, 33 L. Ed. 67, 9 Sup. Ct. Rep. 658; Central New York Telephone & Telegraph v. Averill (1910) 199 N. Y. 128, 92 N. E. 206; Rose v. Gordon (1914) 158 Wis. 414, 149 N. W. 158.
[23] Cal. Civ. Code, § 1674.
[24] Maxim Nordenfelt Gun v. Nordenfelt, supra, n. 14.